1975

Standard Optical Company v. Salt Lake Corporation : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STANDARD OPTICAL COMPANY, et al.,
Plaintiffs-Appellants,

vs.

SALT LAKE CITY CORPORATION, et al.,
Defendants-Respondents.

STANDARD OPTICAL COMPANY,
Plaintiff-Appellant,

vs.

LAWRENCE A. JONES, as Salt Lake City Auditor, et al.,
Defendants-Respondents.

Case No. 13924

APPELLANTS' BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County, Utah, The Honorable Bryant H. Croft, Judge

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NATURE OF THE CASE

This case concerns the legality of proceedings under the Municipal Improvement District Act, Chapter 16, Utah Code Annotated, 1953.

DISPOSITION IN LOWER COURT

Consolidated cases No. 220475 and No. 221266 were

argued on Motions for Summary Judgment by both plaintiffs and defendants and the issue of the interpretation of the construction contract was the subject of a trial before the Court. The Complaint filed by Standard Optical Company, et al., in Civil No. 220475, was dismissed with prejudice on the merits, no cause of action. The Court in so ruling, however, ruled against defendant Salt Lake City Corporation with respect to its contention that the action brought by plaintiff was premature and distinguished the case from *Dawson* v. *Swapp,* 26 Utah 2d 250, 487 P. 2d 1288 (1971), cited by defendants. The Court denied the Petition for a Writ of Prohibition as prayed for in Civil No. 221266.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the proceedings leading to the formation of improvement district Curb & Gutter Extension No. 38-480 declared unlawful; and that said district has no jurisdiction for making the alleged improvements in said district including but not limited to improvements not stated in the notice of intention, to-wit; the narrowing of Main Street, the lowering of the grade of Main Street, and the enlarging of the base of the Brigham Young Monument; for a declaration that the contracts entered into between Salt Lake City Corporation and Gibbons and Reed Company on the 12th day of June, 1974, and the 5th day of September, 1974, are unlawful and void and that defendants Salt Lake City Corporation and Gibbons and Reed Company be enjoined and restrained from performing under said con-

struction contracts; and for a Writ of Prohibition prohibiting the officials of Salt Lake City Corporation from paying any further monies or sums to Gibbons and Reed Company for the furnishing of labor and material incident to the aforesaid construction contracts.

STATEMENT OF FACTS

On December 4, 1973, Joseph S. Fenton, City Engineer for Salt Lake City Corporation, presented his report to the Commissioner of Streets of Salt Lake City recommending that Curb & Gutter Extension No. 38-480 (The Salt Lake City Beautification Project) be approved and that the City Attorney be directed to prepare a notice of intention for the formation of the improvement district (R. 110, Dist. Ct. No. 220475). On December 18, 1973, the Board of Commissioners of Salt Lake City approved the notice of intention as prepared by the City Attorney and moved that it be published in the legal section of the Deseret News, and that protests be considered concerning the proposed district on January 17, 1974 (R. 57, Dist. Ct. No. 220475).

A copy of the notice of intention thus adopted is attached as Exhibit "A" to the Complaint (R. 8, Dist. Ct. No. 220475). The notice of intention, among other things, describes the improvements to be made as follows:

> "* * * to remove all existing curbs, gutters, sidewalks, and street paving and construct new street paving, pedestrian paving, landscape

> structures, planters and planting, curbs, and gutters together with new street lighting and drainage structures and to do all other work necessary to complete the project in accordance with Salt Lake City standards."

It goes on to state:

> "* * * all other necessary things shall be done to complete the whole project in a proper and workmanlike manner according to plans, profiles, and specifications on file in the office of the Salt Lake City Engineer * * *".

The notice further stated:

> "All protests and objections to the carrying out of such intention must be presented in writing * * * on or before the 16th day of January, 1974. The Board of Commissioners, at its first regular meeting thereafter, to-wit; the 17th day of January, 1974, will consider such protests and objections to said improvements as have been made."

The Trial Court found that the proposed improvements included the narrowing of the vehicular traveled portion of Main Street by approximately 24 feet, the lowering of the grade of the street by approximately 1 foot between South Temple Street and 300 South Street, and the blocking of North-South traffic on Main Street through its South Temple intersection by the enlargement of the base of the Brigham Young Monument (R. 290, Dist. Ct. No. 220475). The improvements just re-

ferred to were not described in the notice of intention except as may be encompassed by the reference to "plans, profiles, and specifications on file in the office of the Salt Lake City Engineer."

On January 17, 1974, the date set for the hearing of protests, some discussion was had with regard to the objections, but Mayor Garn discouraged discussion until after the City Engineer had tabulated the protests and determined the percentage protesting (Deposition of E. J. Garn, pages 21 and 22, Appendix pages 16, 17, and 18). The hearing was not adjourned to a fixed date, but a second meeting was held by the Board of Commissioners on January 25, 1974, pursuant to written notice to the property owners (R. 295, Dist. Ct. No. 220475). Based upon the Engineer's tabulation, owners owning 51.32% of the property to be assessed filed protests by January 17, 1974. On February 4, 1974, three of the property owners withdrew their protests reducing the percentage of protestors to 44.4% (R. 152, Dist. Ct. No. 220475, Appendix page 1).

The City Commission had a long standing policy of not creating an improvement district if over 50% of the property owners protested, which policy was reaffirmed by the City Commission at the meeting on the 17th day of January, 1974 (R. 47-409, 296, Dist. Ct. No. 220475). The Board of Commissioners on March 20, 1974, nevertheless authorized the City Engineer to proceed with the project as described in the notice of intention (R. 69, Dist. Ct. No. 220475).

On the 14th day of February, 1974, notice to contractors was published for the construction of Curb & Gutter Extension No. 38-480 (R. 80, Dist. Ct. No. 220475). This was the only notice to contractors which was published (Appendix page 27). A number of contractors picked up the plans and specifications pursuant to the Notice but bids were submitted by only two contractors for the construction of the improvements, to-wit; Shocker Construction Company in the amount of $4,771,581.95; and Gibbons and Reed Construction Company in the amount of $4,123,254.15 (Tr. 548, R. 71, Dist. Ct. No. 220475).

Since the lowest bid was substantially in excess of the Engineer's estimate for the project of $2,875,189.75, the bid of Gibbons and Reed Company was not accepted as submitted. On May 1, 1974, upon recommendation of Joseph S. Fenton, City Engineer, the City Commission accepted an "adjusted bid with deletions" of Gibbons and Reed Company of $2,834,180.96 (R. 71, Dist. Ct. No. 220475). Thereafter on June 12, 1974, a contract was entered into between the City and Gibbons and Reed Company (R. 53, Dist. Ct. No. 220475).

The June 12th contract and the plans and specifications on file on that date did not include a "drainage system" or a "grout system" sidewalk, items which were required to complete the project and which were made necessary by the deletion of the more expensive storm sewer and suspended sidewalk system provided for in the

original plans and specifications (R. 48, 49, Dist. Ct. No. 221266).

The City and Gibbons and Reed Company executed a Supplemental Agreement (Exhibit T-1D, Appendix pages 9, 10, 11), dated September 5, 1974, whereby line items 91 through 98 and 106 through 111 of the June contract were deleted, and new items inserted under those item numbers. By making the changes as aforesaid, Gibbons and Reed Company and Salt Lake City Corporation included the "grout system" in the contract and agreed that the total contract price would be increased by the sum of $784.02. The Trial Court determined that the June 12th contract included the cost of the "grout system" but that the "grout system" and specific costs for the same were not identified as such in the contract (R. 48, Dist. Ct. No. 221266).

The shallow drainage system was the subject of an "order for extra work" dated July 2, 1974, for the additional sum of $14,725.00 over the contract price (Exhibit T7-P).

The June 12th contract was awarded to Gibbons and Reed Company on the theory that it was the lowest bidder at the $4,123,254.15 figure and at the "adjusted bid" figure of $2,834,180.96 (R. 71, Dist. Ct. No. 220475). The City Commission considered the question of rebidding the project after the need for making deletions, additions, and revising the plans became apparent, but decided against rebidding for reasons to the effect that rebidding would involve higher July costs rather than

February costs, that rebidding would delay the October completion date of the first phase, and for the further reason that experience of the City indicated that costs could not be cut by rebidding of a contract (Tr. 539, 540).

On May 1, 1974, the Board of City Commissioners of Salt Lake City approved an interfund loan of $876,-000.00 from the City's General Fund to the newly created special improvement district and a promissory note was executed obligating the special improvement district to repay to the General Fund of Salt Lake City the sum of $876,000.00 together with interest thereon at the rate of four per cent per annum, commencing May 1, 1974 (Appendix pages 37, 38, 39). On July 15, 1974, the first partial estimate in the amount of $17,375.13 was submitted for payment by Gibbons and Reed Company for work and material furnished in connection with the construction of the project, which amount was paid on July 19, 1974, by Warrant No. 688 (Exhibit P-1 to Deposition of Lawrence A. Jones). On July 31, 1974, petitioner, Standard Optical Company, filed a separate action for a Writ of Prohibition, Civil No. 221266, by which, among other things, it sought to prohibit the therein named city officials from paying any funds to Gibbons and Reed Company for improvements not stated in the notice of intention (R. 1-12, Dist. Ct. No. 221266, Appendix pages 40-45). An Alternative Writ of Prohibition was issued by the Honorable Marcellus K. Snow on the 31st day of July, 1974, which included an Order to Show Cause

setting the hearing on the matter for the 15th day of August, 1974 (R. 13-23, Dist. Ct. No. 221266, Appendix pages 49-50). On the 1st day of August, 1974, however, the City Attorney filed an ex parte motion before the Honorable Stewart M. Hanson for an Order Vacating the Alternative Writ of Prohibition which was signed by Judge Hanson on the 1st day of August, 1974 (R. 25-26, Dist. Ct. No. 221266, Appendix page 51). Thereafter petitioner, Standard Optical Company filed a Motion for Reconsideration of the Order Vacating the Alternative Writ of Prohibition. This latter motion, together with a motion to consolidate the two civil actions were heard at the same time the Motions for Summary Judgment were considered (R. 28-29 and 32-33, Dist. Ct. No. 221266). The Motion for Reconsideration was denied for the reason assigned by the Trial Court that the Alternative Writ of Prohibition was in effect a temporary restraining order and no bond had been filed in connection therewith; the Court granted respondents' motion to consolidate Civil No. 221266 with Civil No. 220475 since the issue of lack of jurisdiction was common to both matters (R. 37-40, Dist. Ct. No. 221266).

ARGUMENT

POINT I,

PROCEEDINGS LEADING TO THE FORMATION OF CURB & GUTTER EXTENSION NO. 38-480 WERE IRREGULAR AND CONTRARY TO LAW AND IN VIOLATION

OF PLAINTIFF'S RIGHTS AS CONTEMPLATED BY SECTIONS 10-16-7 AND 10-16-28, UTAH CODE ANNOTATED, 1953.

Section 10-16-7, Utah Code Annotated, 1953, provides, among other things, that an owner of property to be assessed in a special improvement district shall have the right within the time designated in the notice of intention to file a protest to the creation of the district or to make any other objections relating thereto. The notice of intention set forth January 16, 1974, as the deadline for filing written objections to the formation of the District. According to the tabulation of votes prepared by Joseph S. Fenton, and which is set forth in the Appendix, page 1, to this brief, 51.32% of the property owners filed written objections to the formation of the improvement district as of the 17th day of January, 1974.

Mayor Garn testified that the City Commission had a policy of long standing that if a majority of the property owners protested the formation of an improvement district, the City would not go forward with the project. This policy had been adopted by the City notwithstanding the statutory provision contained in Section 10-16-7(3)(a), Utah Code Annotated, 1953, which provides that protests representing two-thirds of the property to be assessed are necessary to deprive the City of jurisdiction to form a district. The City policy of not following the two-thirds provision has been in effect as long as Mayor Garn has been connected with City govern-

ment and he was told by others that that has been the policy of Salt Lake City since, in effect, the beginning of time (Appendix page 15). This policy was publicly reaffirmed by the City Commissioners on the 17th day of January, 1974, at the time and place set for the hearing of protests concerning the formation of the district; each of the Commissioners attending the meeting declared in the presence of those in attendance, that if over 50% of the property owners objected, the City Commissioners would not approve the district (R. 47-49, Dist. Ct. No. 220475).

The tabulation of votes was not known on the 17th day of January and Mayor Garn discouraged discussions with reference to the formation of the improvement district on that day for the reason that a tabulation of the votes had not yet been made. In this connection Mayor Garn said to the people at the meeting, among other things,

> "* * * I * * * explained to the people that were there, * * * that we could not make a decision on the district until we had a tabulation. And I made the comment * * * that we could stay there all day or into next week and either the pros or cons could be verbally discussed but that it could not alter the vote * * *." (Appendix page 16)

Notwithstanding the declaration of the Mayor to abide by the tabulation of votes filed on the 16th day of January, 1974, the City Commission allowed property

owners to withdraw objections on February 4, 1974, as indicated by the tabulation of votes referred to above which resulted in a 44.4% vote against the project instead of 51.32%. What was attempted in these particulars is contrary to *Armstrong* v. *Ogden City*, 12 Utah 476, 43 P. 119 (1895), and *Salt Lake and U. R. Co.* v. *Payson City*, 66 Utah 521, 244 P. 138 (1926), which hold in effect that the City Commission cannot consider withdrawals after the time set for filing of protests. In the *Armstrong* case, supra, the City Council published a notice of intention designating the 29th day of March, 1892, as the time to hear objections in writing to the proposed improvement district. Before the appointed time, a majority of abutting property owners had filed protests. The City Council did not act upon the protests at the time appointed but adjourned from time to time until April 4, 1892. In the meantime some of the owners previously protesting had withdrawn their protests in order to make the protests contain less than one-half of the entire frontage in the paving district. Thereafter the City Council, without publishing a new notice of intention, adopted an ordinance creating the district. The Court held that two essential facts were necessary before the City Council could acquire jurisdiction; (1) that a proper and legal notice of intention had to be published, and (2) that more than one-half of the front feet abutting upon the street to be improved had failed to object within the time specified (the statute then in effect provided for a 50% protest). The Court went on to say,

> "The statute above referred to sufficiently answers this contention. It expressly denies to the city council jurisdiction to proceed with the improvements, if, at the time fixed to hear objections, a sufficient remonstrance is presented. At that time, such a remonstrance was presented. The city council was thereby wholly deprived of power to proceed. No power could be subsequently acquired in that proceeding. A new proceeding might be instituted, and, after due notice of intention, new power could be obtained. The parties protesting and not withdrawing acquired a right to rely upon the statute existing at the time appointed to hear objections, and were entitled to notice of any action affecting their interest. *It may also be that others who desired to object refrained from so doing upon ascertaining that a sufficient protest was already filed.*" (Emphasis added)

The instant case is similar in this regard. Had the protestors known that withdrawals would be allowed after the 16th of January, 1974, and that a two-thirds requirement would be applied instead of a majority, others who refrained from doing so, thinking that a sufficient protest had already been filed, may have protested the district.

The City should not now be heard to say that the abutting property owners are bound by the statutory two-thirds requirement in light of the long standing policy of the City which was reaffirmed on the 17th of January that a majority would control. There is no reason

why the City, who has discretion in the first instance to propose an improvement district, should not be bound by its own policy with regard to the number of protestors required to defeat the project. To do otherwise would violate fundamental principles of due process and fair play and go to the justice of the proceeding as contemplated by Section 10-16-28, Utah Code Annotated 1953.

The case of *Salt Lake and U. R. Co.* v. *Payson City*, supra, is likewise in point. In that case protests were withdrawn during the period of time allowed for the filing of protests . The Court stated in this connection,

> "There can be no question that the property owners who withdrew their protests have the right to protest the improvement, and, in our judgment, likewise have the right to withdraw their protests at any time before the time for filing protests had expired.

According to the notice of intention in the instant matter, all protests were to be filed by the 16th day of January, 1974. The City should not have allowed protests to be withdrawn after that date, and it is submitted that the tabulation of votes of protestors stands at 51.32% as determined by the city engineer. If the City had determined after the meeting of the 17th day of January, 1974, to change its policy in favor of the two-thirds requirement, it should have done so only after the publication of a notice to that effect so as not to lull the property owners into a false sense of

security and in order to give them a fair and reasonable opportunity to present their protests under that standard. The trial Court determined that the City had such a policy but that it was a matter of discretion only and did not affect the jurisdiction of the commission to proceed should they desire to do so (R. 296, Dist. Ct. No. 220475). It is submitted that the trial court erred in this regard and that Improvement District No. 38-480 was improperly formed and that the City had no jurisdiction to proceed in the premises.

POINT II.

ASSUMING CURB & GUTTER EXTENSION NO. 38-480 WAS PROPERLY FORMED, IT HAS NO JURISDICTION OR AUTHORITY FOR MAKING IMPROVEMENTS NOT STATED IN THE NOTICE OF INTENTION, TO-WIT; THE NARROWING OF THE VEHICULAR TRAVELED PORTION OF MAIN STREET, THE LOWERING OF THE GRADE OF MAIN STREET BETWEEN SOUTH TEMPLE STREET AND 300 SOUTH STREET, OR THE ENLARGING OF THE BASE OF THE BRIGHAM YOUNG MONUMENT SO AS TO FORECLOSE NORTH-SOUTH TRAFFIC AT THE INTERSECTION OF SOUTH TEMPLE.

The trial Court found in its first memorandum decision that the proposed improvements included the nar-

rowing of Main Street by 24 feet, that the grade of the street would be lowered approximately 1 foot, and that North-South traffic would be blocked at the South Temple intersection by the enlargement of the base of the Brigham Young Monument (R. 290, Dist. Ct. No. 220475). As previously stated, there was no mention of these improvements in the notice of intention.

Section 10-16-5(1)(d), Utah Code Annotated, 1953, provides with regard to the description of improvements as follows:

> "In a general way, describe the improvements proposed to be made showing the places the improvements are proposed to be made and the general nature of the improvements. The improvements may be described by type or kind and the place such improvements are proposed to be made may be described by reference to streets or portions of streets or extensions of streets or by any other means the governing body may choose which reasonably describes the improvements proposed to be made.

The narrowing of the street, the enlarging of the base of the Brigham Young Monument, and the changing of the grade were significant and important parts of the proposed improvements (Appendix pages 21, 22, 23, and 24). Mayor Garn testified in this regard:

> "Q. With reference to the project, did you feel that it was necessary to advise the prop-

erty owners and the people of the City generally that the street or at least the vehicular traveled portion of the street would be narrowed by approximately 24 feet as a result of project?

A. Well, yes. And it was very widely publicized for a long period of time, and particularly in light of the EPA hearings in July which had a great amount of coverage and discussion.

Q. So it stood out in your mind as a very important item?

A. Well, I think any project of the size of this is important, not any one particular aspect of it. But it is important that the property owners who are going to pay the bill be particularly advised as to what is going to happen." (Appendix page 23).

The notice of intention did not advise the abutting property owners of what was going to happen. Anyone reading the description of improvements in the notice of intention would have come to the conclusion that no changes were going to be made in the width, grade, or flow of traffic on Main Street. The notice of intention describes the improvements as follows, to-wit:

"To remove all existing curbs, gutters, sidewalks, and street paving and to construct new street paving, pedestrian paving, landscape structures, planters and planting, curbs, and gutters, together with new street lighting and drainage structures * * *".

The failure of the notice of intention to mention any other physical items may have caused a person not to protest the formation of the District who would have otherwise done so, and it is by this standard that the notice of intention should be measured. The City has the duty to act in good faith and forthrightly in preparing a notice of intention as required by the statute so as to fully advise all property owners of the essential nature of the improvements. The Utah Supreme Court has passed on matters of this kind before. *Gwilliam* v. *Ogden City*, 49 Utah 155, 164 P. 1022 (1917), is in point. In that case, the notice of intention failed to state that the grade of the street would be lowered for a distance of more than 1,000 feet from a depth of 2 inches at one end to a depth of 1 foot on the other. The statute then in effect provided as follows:

> " 'In all cases before the levy of any taxes for improvements provided for in this chapter, the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied * * *. Such notice shall describe the improvements so proposed, the boundaries of the District to be affected or benefited by such improvements, and the estimated costs of such improvements * * *' ".

The *Gwilliam* case was cited recently by the Supreme Court in the case of *Lewis* v. *Kanab City*, ... U. 2d ....., 523 P. 2d 417 (1974); along with *Jones* v. *Foulger*, 46

Utah 416, 150 P. 933 (1915); and *Ryberg* v. *Lundstrom*, 70 Utah 517, 261 P. 453 (1927).

The trial Court, however, determined that the *Gwilliam* case was not in point for the reason that the statute was changed to provide that improvements could be described in a "general way" by type or kind and that since the notice was to the effect that the street, sidewalks, curbs, and gutters were to be removed and replaced in accordance with plans and specifications on file in the Engineer's office, that that described in a "general way" the improvements to be made. It is submitted that the trial Court was in error. The standard under the old statute should be no different than the standard under the present statute so far as apprising the abutting property owners of the general nature of the improvements proposed to be made. They are, after all, entitled to protest against the formation of the district and they are the ones who will be charged with paying the bill as stated by Mayor Garn. It would have been a simple thing, indeed, to have mentioned these items in the notice of intention. To require the property owners to go to the City Engineer's office and sift through plans and specifications to determine the nature of the project, is absolutely ridiculous and is contrary to the manifest purpose of the statute. Section 10-16-7(2), Utah Code Annotated, 1953, highlights the importance of adequately describing the improvements in the notice of intention, for it provides, among other things, that the governing body "* * * may not provide for the making of any

improvements not stated in the notice of intention * * *".

It is submitted that the notice of intention is fundamentally defective and that the City has no jurisdiction under Curb & Gutter Extension No. 38-480 to narrow the vehicular traveled portion of Main Street, change the grade of the street, or block North-South traffic at the South Temple intersection.

POINT III.

STATUTORY PROCEDURES WERE NOT FOLLOWED IN CONNECTION WITH THE NARROWING OF MAIN STREET.

Section 10-8-8.2, Utah Code Annotated, 1953, requires among other things, that before a street can be narrowed or vacated an ordinance must be passed which ordinance must be based upon the opinion of the governing body that there is good cause for vacating or narrowing the street or any part thereof and that such vacation or narrowing will not be detrimental to the general interest. No such ordinance was passed. The trial Court determined in effect that Section 10-8-8.2 was not the only way that a street could be narrowed and that improvements under an improvement district could include the narrowing of a street without the requisite adoption of an ordinance pursuant to the above section.

There is no specific authority under the Improve-

ment District Act for narrowing a street, Section 10-16-6, Utah Code Annotated, 1953, in this regard states:

> "(a) To establish grades and layout, establish, open, extend, and *widen* any street, sidewalk, alley, or off-street parking facility;" (emphasis added)

It is submitted that the trial Judge erred in holding, in effect, that the narrowing of Main Street could be done under the authority of the Improvement District Act without enacting an ordinance.

The Court also concluded that "street" in the context of Section 10-8-8.2, supra, meant the right-of-way from property line to property line and that the right-of-way was not being narrowed. "Street" is a term that has various meanings depending on the context in which it is used. For example: 39 Am. Jur. 2d, *Highways, Streets and Bridges*, Section 1, page 402, states:

> "In some instances and for partcular purposes the term 'highway' has been defined to encompass the entire right-of-way, including the shoulder and other places open to travel, but in other instances and for other purposes the term has been defined narrowly so as to exclude the exterior boundaries of the right-of-way and confine its meaning to that part of a public road open to the use of the public for the purpose of vehicular travel."

The case of *Public Utilities Commission of Utah* v. *Jones*, 54 Utah 111, 179 P. 745 (1919), recognized that the term

"public highway" had different meanings depending upon the context in which it was used.

From the context of Chapter 8, Utah Code Annotated, 1953, in which the aforesaid statutory section is found it is apparent that the legislature was thinking of "street" as the vehicular traveled portion. Section 10-8-8, for example, in delineating the powers of the cities, separately refers to streets and sidewalks, as follows:

> "They may lay out, establish, open, alter, widen, grade, pave, or otherwise improve streets, alleys, avenues, boulevards, sidewalks * * *".

That same chapter, at Section 10-8-23, grants authority to the city to impose upon the owners or occupants of property the duty of keeping the sidewalks in front of their property free from snow, litter, ice and obstructions, and defines sidewalks as that portion lying in front of the property to the curb line of the street.

It is submitted that the word "street" as used in Section 10-8-8.2, means the vehicular traveled portion of the street and not the entire right-of-way.

As a general proposition, procedures for narrowing a street must be strictly followed. This general principle has been enunciated in the cases of *Hall* v. *North Ogden City*, 109 Utah 304, 166 P. 2d 221 (1946), and *Boskovich* v. *Midvale City Corporation*, 121 Utah 445, 343 P. 2d 435 (1953). In the latter case, the court stated,

> "We believe and hold that the procedure followed by Midvale in this case sans notice, petition, or hearing, was an unquestioned departure from the elementary principle that property cannot be taken without due process of law and without just compensation."

An annotation appearing at 175 A. L. R. 760, entitled, "Necessity for Adhering to Statutory Procedure Prescribed for Vacation, Discontinuance, or Change of Route of Street or Highway", likewise sets forth the general proposition that statutory procedures must be strictly followed.

Section 10-8-8.2, supra, manifests the legislative intent that narrowing of a street is a matter that should be done only upon serious deliberation, a condition which was wholly lacking in the instant matter when considered in light of the fact that there was no mention in the notice of intention that the street would be narrowed.

It is submitted that the trial Court's definition of "street" to mean the right-of-way from property line to property line is in error and contrary to the plain meaning of the statute as applied to the facts of this case.

POINT IV.

THE COURT ERRED IN NOT SETTING ASIDE THE ORDER VACATING THE ALTERNATIVE WRIT OF PROHIBITION AND A PERMANENT WRIT OF PROHIBITION SHOULD BE ISSUED.

The Order Vacating the Alternative Writ of Prohibition in Civil No. 221266 was granted upon the ex parte application of the City Attorney without notice to petitioner. It appears from the Order (Appendix page 51) that the reason the Writ was set aside was that no bond was posted. The answer to the Writ of Prohibition which was subsequently filed, however, does not raise this as a defense (Appendix page 46-48).

Rule 65B(b)(4), Utah Rules of Civil Procedure, grants authority to the Court to arrest ministerial proceedings when it appears that officials are about to act without or in excess of their jurisdiction. There is no requirement in that rule for the posting of a bond. The posting of a bond is applicable to Rule 65A, entitled "Injunctions". It would be a strange thing indeed if a bond were required to prohibit an official from performing an unlawful act.

The gravamen of the Petition for Writ of Prohibition (Appendix page 40) was to prohibit the respondents as City Officials from paying monies to Gibbons and Reed Company for improvements not stated in the notice of intention. As previously stated, supra, Section 10-16-7(2), Utah Code Annotated, 1953, prohibits the governing body from making any improvements not stated in the notice of intention. The narrowing of Main Street, the lowering of the grade of Main Street, and the blockage of North-South traffic at the South Temple intersection were not stated in the notice of intention (POINT II of Appellants' Argument), and consequently, the City

officials were without jurisdiction or authority to use special improvement district funds to pay for these so-called improvements.

The answer to the Petition for Writ of Prohibition admits that the special improvement district had borrowed $876,000.00 from the general fund of the City and that the City had paid $17,375.13 of said funds and intended to pay additional funds to Gibbons and Reed Company for labor and material furnished in connection with said improvements. Respondents' answer had not been filed on the 31st day of July when Judge Snow signed the Alternative Writ of Prohibition but the Deposition of Lawrence A. Jones had been taken which established the factual premise aforesaid (Appendix pages 37-39).

Based upon these allegations and the posture of the case as it existed on the 31st day of July, 1974, in issuing the Writ Judge Snow concluded that the respondents were acting and were intending to act in excess of their statutory authority in the particulars aforesaid and that petitioner had no plain, adequate, or speedy remedy in the ordinary course of law to prohibit the unlawful activities. In addition to not following the rule that one District Judge cannot overrule another acting District Judge having identical authority and stature, *Utah* v. *Morgan*, ... U. 2d ....., 527 P. 2d 225 (1974), it is submitted that the trial Court erred in holding: that before an extraordinary writ can be issued under Rule 65B-(b) (4) that it must be established at a trial upon the

merits that the respondents were acting without or in excess of jurisdiction; that the "Alternative Writ of Prohibition" was a temporary restraining order; and that petitioner had failed to comply with Rule 65A(c) with regard to the posting of a bond.

Although the Utah Rules of Civil Procedure abolishes extraordinary writs by name, according to *State of Utah* v. *Henry Ruggeri, District Judge*, 19 Utah 2d 216, 429 P. 2d 969, (1967), "* * * the remedy remains the same as when names were important * * *". Writs of Prohibition to restrain public officials from performing alleged unlawful ministerial acts have been issued in the State of Utah without any mention of a bond being required, *Parkinson* v. *State Bank of Millard County*, 84 Utah 278, 35 P. 2d 814 (1934); *Barnes* v. *Lehi City*, 74 Utah 321, 279 P. 878 (1929). The *Parkinson* case, supra, involved the application for Writ of Prohibition to restrain a bank commissioner from paying general claims until the balance of a legatee's claim was satisfied. *The Writ was issued notwithstanding the fact that an appeal was pending in the Utah Supreme Court determination.* The *Barnes* case, supra, involved the issuance of a Writ of Prohibition to prevent the city from contracting to purchase certain electrical equipment. With reference to the propriety of the Alternative Writ of Prohibition being granted, the *Barnes* case stated:

> "It is next contended by counsel amici curiae that this court should not grant the application for the writ of prohibition, for the reason

that *plaintiffs have a plain, speedy, and adequate* remedy by injunction As a general rule prohibition will not lie where the applicant has any other plain, speedy, and adequate remedy in the ordinary course of law. When there is another remedy, the writ is not demandable as a matter of right. The writ may, however, be issued in the exercise of a sound judicial discretion. The law on the subject, as now understood was stated by the Supreme Court of the United States in Re Rice, Petitioner, 155 U. S. at page 402, 15 S. Ct. 152, 39 L. Ed. 198, as follows:

> 'Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary.'

The rule there announced was referred to with approval by this court in *Oldroyd v. McCrea,* 65 Utah, 142, 235 P. 580, 40 A. L. R. 230. We recognize the importance of placing reasonable restrictions upon the use of the writ of prohibition, and have no desire to encourage

> the practice of invoking the original jurisdiction of this court by resorting to these extraordinary remedies. This court has, however, in a great many of the cases cited by plaintiffs, entertained applications for writs in situations similar to the situation here involved. We think that the facts and circumstances of this case justify us in entertaining plaintiff's application for the writ."

From the foregoing it is apparent that the discretion exercised by Judge Snow in issuing the Alternative Writ of Prohibition should not have been set aside by another District Court Judge on an ex parte application; that the extraordinary remedy (Writ of Prohibition) is distinct from injunctive relief; that the same does not have to be issued only after a trial on the merits establishing lack of jurisdiction.

A permanent Writ of Prohibition should be issued by this Court prohibiting respondents from paying any sums from improvement district Project No. 38-480 to Gibbons and Reed Company for work done and material furnished in connection with narrowing Main Street, changing the grade of the street, and widening the base of the Brigham Young Monument, items not set forth in the notice of intention to form said district.

POINT V.

THE CONTRACTS DATED JUNE 12, 1974, AND SEPTEMBER 5, 1974, BETWEEN SALT LAKE CITY CORPORATION AND GIB-

BONS AND REED COMPANY WERE NOT AWARDED PURSUANT TO PUBLIC BID AS REQUIRED BY LAW.

The base bid of Gibbons and Reed Company was $4,122,254.15 which was substantially in excess of the Engineer's original estimate of $2,875,189.75. In order to bring the project in line with the estimate, deletions were made of some of the proposed improvements, among which were the suspended sidewalk system and the storm sewer, (Appendix page 36). The suspended sidewalk system, which was designed to allow surface water to drain through the sidewalk onto a concrete underlayment, was estimated to cost $731,434.50. The storm sewer was estimated to cost $202,534.50. With these deletions it was necessary to replace the proposed storm sewer with a "shallow drainage system", estimated to cost $22,786.00 and a "grout system" sidewalk (pavers being set directly in grout), costing $540,789.02 (Exhibit P-3, Appendix page 36). The "grout system" and the "shallow drainage system" were not the subject of public bid and the plans and specifications for these items were not contained in the plans and specifications referred to in the Notice to Contractors. Appellants contend that the trial Court was in error in finding, to the effect, that these additions need not be the subject of public bid and were in accordance with law.

The June 12th contract did not provide for a "grout system" sidewalk. In this regard it merely changed the quantity of heavier, reinforced pavers which were to be

used in connection with the suspended sidewalk system (Appendix pages 13, 14). When it was discussed at the first hearing that the "grout system" and the "shallow drainage system" were not in the June 12th contract, notwithstanding representations to the contrary in Exhibit P-3, (Appendix pages 32-36), the trial Judge was left in doubt as to what the June 12th contract contained, thus necessitating an evidentiary hearing on the matter.

Prior to the second hearing, Salt Lake City Corporation and Gibbons and Reed Company entered into a Supplemental Agreement dated September 5, 1974, by which the very line items which were previously changed in the June 12th contract, to-wit: items 91 through 98 and 106 through 111, were deleted and new items substituted under those numbers. The Supplemental Agreement is set forth in full in the Appendix pages 9-12. By the Supplemental Agreement the "grout system" was added to the project for the additional sum over the contract price of $784.02. The die was cast, however, with respect to the "shallow drainage system", an "Order for Extra Work" dated July 2, 1974, authorized the payment to Gibbons and Reed Company of $14,725.00 for this additional item. In view of the pattern set by the "Order for Extra Work" for the "shallow drainage system" and the Affidavit of Warren R. Fenn stating the position of Gibbons and Reed Company that any additional work under the June 12th contract would have to be handled under "Extra Work Orders", it appeared that the City would be obligated to pay the ad-

ditional sum of $540,789.02 over the contract price for the "grout system".

The revised plans and specifications necessitated by the deletions of the aforementioned items did not arrive from Barton and Aschman, the architectural firm employed by the City, until June 11, 1974, (R. 142, Dist. Ct. No. 220475). Mayor Garn testified that the signing of the June 12th contract was delayed until the revised plans and specifications had arrived, (Appendix page 22).

Had the several contractors who evidenced an interest in the project been given notice of the revised plans and specifications by a new Notice to Contractors and given an opportunity to bid the project as revised, they may have been interested in submitting bids resulting in substantial savings to the City. The law in this particular is stated in 64 Am. Jur. 2d, *Public Works and Contracts*, Section 66, Page 921, as follows:

> "After bids have been made upon the basis of plans and specifications prepared by public authorities and given out to all interested bidders, no material or substantial change in any of the terms of such plans and specifications will be allowed without a new advertisement giving all bidders opportunity to bid under the new plans and specifications.
>
> Thus, public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and

> specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into containing substantial provisions beneficial to the bidder which were not included in the specifications, is void. Any other course would prevent real competition, lead to favoritism and fraud, and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications."

When asked why a new Notice to Contractors was not given, Mr. Fenton testified in his Deposition,

> "I just don't think it was ever considered. The low bid came in and it was just decided upon to negotiate with the low bidder." (Appendix page 29).

Mr. Harmsen testified, however, that the City Commission did consider the question of rebidding the project after the need for revising the plans became apparent but decided against it for the reasons that it would cause delay, prices would increase because of inflation, and that in their experience costs could not be cut by rebidding the contract (Tr. 539, 540).

The excerpt from Exhibit "A" to the Findings and Conclusions of Law set forth at page 8 of the Appendix shows that Shocker Construction Company was the low bidder for the suspended sidewalk systems at $650,083.00 as compared to $731,434.50 for Gibbons and Reed Com-

pany. Nobody knows what a bid would have been for the "grout system" which consisted of smaller, unreinforced pavers set directly in grout, and Mr. Harmsen and the Commissioners' conclusion that costs could not be cut by rebidding of the contract is unfounded. It appears from the above figures, which were before the Commissioners that the cost of the "grout system" could have been decreased substantially by awarding that portion of the contract to Shocker Construction Company after obtaining a new bid. The nature of the work involved in the "grout system" was also much less exacting and complicated which would have reduced the price. In this connection, Mr. Fenton testified:

> Q. "Would it be a fair statement, Mr. Fenton, to say that * * * it was one of the most critical features of the contract that these pillow blocks be placed in such a way that not even one-eighth inch variation would be tolerated; is that not a fact?
>
> A. I'm not sure of the exact dimensions. I know they had to be very, very accurate.
>
> Q. With respect to the nature of the work now in the system that you have identified here as the grout system, the nature of the work in laying those blocks is less critical, is it not, than the nature of the work required in terms of the suspended system * * *?
>
> A. Yes, I think that would be a fair statement." (Tr. 485 and 486).

By awarding the contract to Gibbons and Reed Com-

pany after deleting the "suspended system" and substituting the "grout system" substantial benefits resulted to Gibbons and Reed not available to other contractors since the nature and complexity of the work would have been taken into consideration and reflected in new bids.

Section 10-16-8, Utah Code Annotated, 1953, provides, among other things

> "* * * improvements in the special improvement district shall be made only under contract duly let to the lowest responsible bidder * * *. If the price bid by the lowest and best responsible bidder exceeds the estimated costs as determined by the engineer of the municipality, the governing body may nevertheless award a contract for the price so bid. The governing body may in any case refuse to award a contract and may obtain new bids after giving a new notice to contractors or may determine to abandon the district or not to make some of the improvements proposed to be made."

Defendants made it appear that the June 12th contract was awarded on the basis of deletions alone in order to fit it into the above statutory provision that the City could elect not to make some of the improvements. By entering into the September 5, 1974, supplemental agreement defendants were attempting to do indirectly what they could not do directly by the June 12th agreement. The machinations of defendants in these particulars were calculated to avoid the statutory mandate of

public bidding. The law applicable to the instant matter is set forth in an annotation appearing at 69 A. L. R. 697, entitled "Evasion of Law Requiring Contract for Public Work to be Let to Lowest Responsible Bidder by Subsequent Changes in Contract After it Has Been Awarded Pursuant to that Law". *Lassiter and Company* v. *Taylor,* 99 Fla. 819, 128 So. 14 (1930), is reported in full in that annotation. In that case after the contract was let, the kind of paving was changed from concrete to "Densite" without calling for new bids. The Court held that the City Council had no right to thwart the law requiring contracts to be let to the lowest responsible bidder. The Court stated:

> "We now have before us a case where the contract was made in violation of a mandatory provision of the charter, which requires such contracts to be let to the lowest responsible bidder. We quite agree with the Supreme Court of California, when it says: 'This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing".

Another annotation appearing at 135 A. L. R. 1265, is also applicable. It is entitled "Statute Requiring Competitive Bidding for Public Contract as Affecting the Validity of the Agreement Subsequent to the Award of the Contract to Allow the Contractor Additional Com-

pensation for Extras or Additional Labor and Material Not Included in the Written Contract". The general rule in the annotation is stated as follows:

> "In general, but subject to certain limitations and exceptions which are considered in subsequent subdivisions of this annotation statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable any subsequent agreements to pay one to whom public contract has been duly awarded additional compensation for extra work and materials not included in the original contract at least where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding."

The exceptions noted in the annotation involve situations in which after the contract was let and work begun, modifications were necessary due to *unanticipated* changes in the nature of the work, a situation not applicable to the case at hand since all of the changes required to be made in the instant matter were known prior to the award of the June 12th contract. Section 10-7-20, Utah Code Annotaed, 1953, is also applicable. It provides, among other things, that improvements costing in excess of $12,000.00 must be awarded to the lowest responsible bidder.

Assuming that the supplemental agreement and the extra work order for the drainage system were legitimate and based upon unforeseen circumstances which they

were not, in view of the fact they both involved expenditures in excess of $12,000.00, it would appear that under Utah Law these additions should have been awarded on the basis of public bid. It is submitted that the trial Judge erred in concluding that the June 12th agreement and the supplemental agreement of September 5th were in accordance with the law and were valid.

CONCLUSION

From the notice of intention to the letting of contracts to Gibbons and Reed Company, the City failed to abide by statutory standards which were adopted for the protection of the property owner and public. Main Street is the life-blood of the abutting property owner and the City should be held to the highest of standards in proceedings to alter or modify the street by way of beautification or otherwise. There should be no doubt about what standard the City is using to measure the requisite number of protests or the effective date when protests to the formation of a district will be considered. There should be no argument about the sufficiency of the notice of intention apprising property owners of the material features of the project. The public should not be driven to a search of the plans and specifications on file with the City Engineer to apprise themselves of the nature of the project. Contracts should be let to the lowest responsible bidder and the public should not have to speculate about who *might* have been the lowest bidder under revised plans and speculations. The ques-

tion of what the contract contains should not have to be determined only after a trial on the merits.

To put the blessing of validity on the proceedings of the City in the instant matter would be for the "law to aid in its own undoing", *Lassiter*, supra. Appellants should be granted the relief prayed for and Curb & Gutter Extension No. 38-480 and all things flowing therefrom should be declared unlawful and void.

Respectfully submitted,

GUSTIN & GUSTIN

Attorneys for Appellants